



Written Statement of

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before the

**United States House of Representatives**  
**Committee on the Judiciary**

**Subcommittee on the Constitution and Limited Government**

concerning

**Civil Asset Forfeiture**  
**HR 1525 -- FAIR Act of 2023**

**June 6, 2023**  
**2:00 P.M.**

Good afternoon, Chairman Johnson, Ranking Member Scanlon, and Distinguished Members of the Subcommittee on the Constitution and Limited Government.

It is my privilege to submit written testimony in support of the Fifth Amendment Integrity Restoration Act of 2023 (HR 1525). I commend the Subcommittee for holding this hearing on such an important topic to the American people. There is an urgent need for meaningful reform of federal civil asset forfeiture laws to ensure that the hard-earned, private property of innocent residents is duly protected from wrongful seizure and forfeiture by governmental authorities.

My name is Louis S. Rulli and this is my 28<sup>th</sup> year on the Penn Carey Law faculty during which I have studied and written frequently about civil asset forfeiture and have represented many property owners who have faced loss of their property to civil forfeiture. I have trained *pro bono* lawyers from Philadelphia's largest law firms in civil forfeiture and have authored a training manual for their use. I also direct a Civil Practice Clinic in which certified law students represent low-income Philadelphia residents under faculty supervision in civil forfeiture proceedings. Our Clinic's work on civil forfeiture was highlighted in a cover story, *Taken*, appearing in the *New Yorker* magazine on August 12, 2013.

### **The Law Clinic's Work in Civil Forfeiture**

Over the past twenty years or more, the Civil Practice Clinic at the University of Pennsylvania Carey Law School has provided free legal representation to indigent Philadelphia homeowners faced with civil forfeiture petitions filed against their homes. The overwhelming bulk of these homeowners were not accused of or convicted of any crime. We saw repeated patterns in these cases that revealed much about how civil forfeiture plays out in low-income, minority communities. In many of these cases, the homeowners were older residents who were law-abiding citizens who had never committed a crime in their lives. Many were retirees tending to personal challenges of poverty and ill-health who agreed to take extended family members into their homes during hard economic times.

In many cases, we found that a homeowner's adult son or grandson was arrested for low-level drug offenses, usually the sale of marijuana or crack cocaine for twenty dollars each to undercover agents and confidential informants. Almost always, police initiated controlled buys by placing a phone call to the cell phone of the adult child or grandchild. Often, a confidential informant then arranged to meet the son or grandson at the front door of the home in which he may have resided or visited family (but did not own). Almost without exception, police reports documenting their observations of the home and drug transactions reported no involvement (or even physical presence) of the homeowner. It was clear that these transactions were hidden from the homeowner, providing additional evidence that the son or grandson knew that their parents or grandparents would not approve of their drug involvement. And, contrary to popular images sometimes conjured up by police or prosecutors, these homes were certainly not "crack houses." They were stable residences in impoverished communities where homeowners tried their best to watch over their property; there were not any claims that strangers were coming and going from their homes at all hours of the day or night.

There were so many requests for free legal help due to the high volume of civil forfeiture petitions filed against homes, cars, and cash in low-income Philadelphia neighborhoods that the Clinic decided to adopt a case acceptance policy that prioritized the defense of homes. With some exceptions, we used our limited resources to help homeowners save their homes, since these cases appeared to have the greatest impact on the well-being of whole families and especially innocent young children.

We found that entire families were the “collateral damage” of harsh civil forfeiture policies that enabled the government to seize homes for an adult child’s alleged transgression, and sometimes for the actions of non-residents. In addition, at times for compelling reasons, we also represented individuals whose cars or cash were seized by police and were the subject of civil forfeiture petitions. Many such clients were elderly and almost all were African American or Latino residents.

Almost without exception, each client asked the same question: How is it possible that the government could take their home for something they did not do? How could they lose their property to the government when they were not even accused of a crime?

At first, we tried to refer these clients to the Public Defender’s office, but we learned that they did not handle these cases because they were not criminal cases. We also learned that the local legal aid program did not handle these cases because their limited resources were already overtaxed by a broad range of civil cases, such as mortgage foreclosure, landlord-tenant, consumer protection, family law, and public benefits cases. In short, no one in Philadelphia was providing free legal help to property owners who were too poor to hire a lawyer in civil forfeiture cases.

The Clinic handled scores of civil forfeiture cases over two decades beginning around 2000. In this testimony, I will briefly several cases that provide needed context for an examination of civil forfeiture. These cases are representative of patterns we saw with great frequency on the ground in low-income and minority communities as the government actively pursued the forfeiture of family homes, cars, and cash in civil forfeiture. While these cases were prosecuted by state authorities under state law, Pennsylvania civil forfeiture law was largely modeled on federal civil forfeiture law and therefore the lessons we learned apply broadly to civil forfeiture.

### **An Early Civil Forfeiture Case**

One of the first cases to come to the clinic was that of a 77 year-old Black female homeowner who was suffering from end-stage renal disease. She relied on her neighbors to help her with daily needs and therefore left her North Philadelphia front door unlocked so that neighbors could check on her and complete errands for her. Three days each week she was out of the home to receive dialysis treatment. In 2001, police alleged that they were chasing a neighborhood drug dealer near her home and that he ran through the front door of her home and out her back door as they pursued him in chase. The client homeowner gave police permission to search her home and the police reported that they found a small quantity of drugs in plain view in her home, presumably dropped by the fleeing individual. Although the elderly homeowner was certainly not charged with any criminal offense, the District Attorney’s office filed a petition for civil forfeiture against her home in September of 2001.<sup>1</sup> The homeowner was indigent and unable to afford a lawyer and came to the

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<sup>1</sup> Com. v. 1365 W. Colwyn Street, Court of Common Pleas, 010902903.

Penn Law Clinic in early 2002. The Clinic undertook representation and filed affirmative defenses to the forfeiture petition. In November 2003, some twenty-three months after the filing of the forfeiture petition and after multiple court listings, the District Attorney's office withdrew the petition against her home.

This was our introduction to civil forfeiture. Scores of cases would follow that tell the story of civil asset forfeiture in low-income, minority communities.

### **Mary and Leon Adams**

The *New Yorker* magazine highlighted the story of Mary and Leon Adams.<sup>2</sup> Mary and Leon were an African-American married couple living in West Philadelphia. They came to the Penn Law Clinic after being served with a civil forfeiture petition filed by the Philadelphia D.A.'s office seeking to forfeit their home for three alleged \$20 marijuana sales by their adult son. Allegedly, one of those sales had occurred on the porch of their home. Mary and Leon Adams were 68 and 70 years of age, respectively, and upright, law-abiding citizens; they had never been accused of, charged with, or convicted of any crime. Leon was a former steel plant worker; Mary was a retail saleswoman and former block captain in her neighborhood. Their home was all paid up, and they now were retired, living on very modest means and financially eligible for free legal services under federal poverty guidelines.

Mr. and Mrs. Adams were very frightened about the prospect of losing their home in their senior years with nowhere to go. They were also frightened for their adult son who was now facing criminal charges for a drug offense. They did not know how they were going to help their son through this situation. And they were especially frightened about the possibility of losing their home because Leon was battling pancreatic cancer, and they needed to spend a lot of their time and energy at the hospital and with his doctors. They did not know what to do and they did not understand how their home could be taken from them when they had not done anything wrong.

Pitted against the power of the state and too poor to afford a lawyer, Mary and Leon could have easily lost their home at a most vulnerable time in their lives. However, they were more fortunate than many others. They learned of the Penn Law Clinic and received free legal help. Certified legal interns in the Clinic conducted interviews, filed pleadings, engaged in fact investigation and formal discovery, and entered into prolonged negotiations with the District Attorney's office. After more than a year of pre-trial litigation<sup>3</sup> and only after substantial public exposure in the popular media, the Clinic obtained a court-approved agreement that saved their home from civil forfeiture.

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<sup>2</sup> Mary and Leon's story was featured in the *New Yorker's* cover article, *Taken*, with their permission. See Sarah Stillman, *Taken*, THE NEW YORKER, Aug. 12, 2013, available at <http://www.newyorker.com/magazine/2013/08/12/taken>. At first, Mary and Leon did not want to disclose their story to the public, but they ultimately decided they would do so if their plight could help others facing the same situation.

<sup>3</sup> *Commonwealth v. 5937 Vine St.*, No. CP-51-MD-0008959-2012 (Ct. C.P. Phila. Cty., Sept. 2012).

But many other Philadelphians were not so fortunate.

### **Elizabeth Young's Story**

Like Mary and Leon Adams, Elizabeth Young is an elderly, Black homeowner in Philadelphia. She purchased her West Philadelphia home in the 1970s and worked for Amtrak for more than twenty-five years.<sup>4</sup> She retired in 1995 and at age 70, after her husband's death, she remained in her West Philadelphia home while being active in her church and assisting the needy as a missionary. Her health began to fail in her later years and she purchased a used Chevrolet Venture in 2006 to transport her to her medical appointments. Her health worsened in 2009 when she suffered blood clots in her lungs and was hospitalized for several weeks, requiring bed rest and several medications.

At this time, Ms. Young's adult son resided in her home along with two of Ms. Young's grandchildren. Her son was then nearly fifty years of age. When he was a teenager he had a drug problem and was incarcerated. Ms. Young had banned her son from her home at that time, and they were estranged for many years. But in later years as her son advanced through middle age, he appeared to have turned his life around. He had children and was a responsible father. When he needed a place to live, Ms. Young let him in to her home and he proved quite helpful to her in her later years as her health problems worsened.

In 2010 and 2011, her son was arrested for several sales of small packets of marijuana for \$20 each to confidential informants working with police narcotics agents. Each marijuana sale was initiated by the police with a phone call to him on his cell phone (not on a house phone), offering to buy marijuana and arranging to meet him at or near his residence. The D.A.'s office prosecuted the son for these drug offenses, but then it did something more. It brought a civil forfeiture petition against Ms. Young's home *and* car, alleging that Ms. Young's property facilitated her son's Donald's several marijuana sales. Ms. Young was not charged with a crime, and it was clear from police reports that officers never suspected her of any criminal wrongdoing. Ms. Young was about to lose her home and her car at age seventy and infirm for her adult son's low-level marijuana sales, even though she earnestly believed (as she testified at trial) that, to her knowledge, he was not again involved with drugs.

Unlike the Adams case, the D.A.'s office was unwilling to resolve Ms. Young's case amicably. We assisted Ms. Young in obtaining *pro bono* legal help from a large Philadelphia law firm that had previously worked with the Clinic on civil forfeiture cases. At trial, Ms. Young contended that she was an innocent owner because she neither knew nor consented to any drug activity by her fifty-year old son. She also

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<sup>4</sup> Notes of Testimony ["N.T."] 56-57, 59, *Commonwealth v. 416 S. 62nd St.*, No. CP-51-MD-0002972-2010 (Ct. C.P. Phila. Cty. May 1, 2012); *Commonwealth v. 1997 Chevrolet*, No. CP-51-MD-0013471-2010 (Ct. C.P. Phila. Cty. May 1, 2012).

argued that the government's taking of her home and car for her son's marijuana sales violated the Eighth Amendment's Excessive Fines Clause.

The trial judge rejected Ms. Young's innocent owner defense, instead adopting the prosecutor's claim that Ms. Young had turned a *blind eye* to her son's drug activity and that her negligence, however minor, justified the taking her home and car. The trial judge was not persuaded by affidavit testimony from a close neighbor verifying that Ms. Young had been a good neighbor and community resident, and that the neighbor had never observed any drug activity at Ms. Young's house.

The trial court also rejected Ms. Young's "excessive fines" defense, reasoning that the forfeiture of both Ms. Young's home and car were not grossly disproportional to the gravity of her son's marijuana offenses. To reach this conclusion, the trial court simply compared the *maximum* statutory authorized fine for Donald's criminal conduct (at least \$80,000) to the market value of Ms. Young's home (approximately \$54,000) and concluded that that it was not excessive. It did not matter to the court that no fine was actually assessed against her son, only court costs assessed in every criminal case in Philadelphia.

At age seventy and innocent of any criminal wrongdoing, Ms. Young found that her own government had taken her home and car and threw her and her grandchildren on the street. Claims of a statutory innocent owner defense and a constitutional excessive fines defense, and even legal representation from a large law firm, were not enough to save Ms. Young and her grandchildren from being thrown out on the street for her adult son's conduct. This is what civil forfeiture means in poor and minority neighborhoods, where abuse of this extraordinary governmental power plays out with disturbing frequency.

Fortunately, with the assistance of free counsel, this is not the end of the story. After several years of appeals, Ms. Young prevailed in a state intermediate appellate court and then again in the Pennsylvania Supreme Court when the government took the case to the highest state level. The Pennsylvania Supreme Court rejected the government's arguments and issued a groundbreaking decision on the proper application of the excessive fines clause of the U.S. and Pennsylvania Constitutions to civil forfeiture cases.<sup>5</sup>

## High School Student

In a more recent case, the Clinic was contacted by a Philadelphia judge concerned about obtaining representation for a fourteen year-old, Black high school student residing with his mother in a home that became the subject of a civil

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<sup>5</sup>. See *Commonwealth v. Real Property and Improvements Commonly Known as 416 S. 62nd Street and 1997 Chevrolet*, 160 A.3d 153, 639 Pa. 239 (2017). It is also important to note that as this case was proceeding through state appeals, the Institute for Justice was challenging abusive forfeiture practices in Philadelphia in a federal class action lawsuit that resulted in a favorable class wide settlement reforming city practices. See *Sourovellis v. City of Philadelphia*, Civil Action No. 14-4687 (E.D. Pa.) and Opinion denying the City of Philadelphia's motion to dismiss at 103 F. Supp. 3d 694 (E.D. Pa. 2015).

forfeiture petition filed by the district attorney's office. The high school student, T.H., inherited the property from his great grandfather according to a will that would transfer title to him when he reached the age of twenty-five. In the meantime, his mother was the executor of the grandfather's estate and the trustee of the property.

T. H.'s father, who did not live with him at the property but who spent time at the property visiting with him, was convicted of selling drugs and the district attorney's office sought to forfeit the home in which T.H. and his mother resided. The D.A. alleged that the property facilitated the drug offenses because police found small amounts of drugs and related items in an upper-floor bedroom of the home where the father stayed when he visited. The sale of the drugs did not occur at the home; they occurred at a location two miles from the property.

T.H. resided in this home his entire life and he attended the local public high school where he was an excellent student. Neither T.H. nor his mother were suspected of any wrongdoing and no criminal charges were brought against T.H. or his mother.

The presiding judge appointed the Clinic as *guardian ad litem* for T.H. to protect his interests in this forfeiture proceeding while the Trustee was separately represented *pro bono* by private counsel. T.H. and his mother were a low-income family who qualified for free legal services under federal poverty guidelines. The home left to T.H. by his grandfather was of considerable financial value, assessed at between \$164,000 and \$200,000 and it represented an important intergenerational wealth transfer in a low-income, minority community. Moreover, T.H. was very active in his community and the loss of his home would not only have substantial financial consequences, but also would have disrupted his education and development at a critical stage of his life and may have resulted in homelessness for him and his mother.

Without the Clinic's representation of T.H. and the pro bono representation of his mother as Trustee, T.H. might have lost the property to a default judgment or to an unfamiliarity with the defenses that were available to him. He was clearly an innocent owner entitled to assert that affirmative defense and there were strong defenses to the claim that the property facilitated the drug offenses by his father. Moreover, the forfeiture of this property under these circumstances would have constituted an excessive fine in violation of both the U.S. and Pennsylvania Constitutions. Without legal help, the consequences might have been disastrous.

The forfeiture petition should never have been brought in the first place. However, the financial incentives embedded in civil forfeiture laws encouraged these abuses as law enforcement agencies and their budgets are the beneficiaries of all forfeited property. With free counsel provided to T.H. and his mother, the case was aggressively litigated and favorably concluded at the pre-trial stage.

## **Health Care Worker**

A.P. was a middle-aged, Hispanic single parent, a hard-working health care worker employed outside of her home. Police seized and sealed her home under Pennsylvania's civil forfeiture law, kicking her out on the spot without any advance notice or opportunity to be heard. The seizure was based upon low-level drug sales alleged to have been committed by her adult son and her son's friend who was temporarily living with them. She had agreed to allow her son's friend to live in her home temporarily because he had nowhere else to live.

A.P.'s clothes, medicine, and other belongings remained locked in her home when police seized her home and literally threw her on the street. She was out of her home for two months, forced to live temporarily with her sister in overcrowded conditions. She committed no crime and was never charged with a crime.

With the Clinic's help, she filed a motion to be restored to her home. However, the district attorney's office still refused to allow her to return to her home. The Court held a full hearing, after which it ordered that she be returned to her home. Though justice was ultimately obtained for her, it took two months and full legal proceedings to get her back into her home.

## **A Child's Piggy Bank**

While the Clinic handles mostly home forfeiture cases, at times it also provided representation to protect cars and cash owned by low-income families. In one Clinic case, the police confiscated the piggy bank belonging to our client's young daughter when they searched the client's home following a third party's alleged drug offense. The piggy bank contained the young girl's birthday money totaling \$91. Neither mother nor daughter was ever charged with any criminal wrongdoing, but the district attorney's office still refused to return the piggy bank. It took over twelve months and many court appearances before our client was able to get her daughter's piggy bank money returned. Without free legal help, the client would have certainly given up.

## **Data**

These few cases outlined here were not outliers, nor were they cherry picked from the large number of Philadelphians harmed by civil forfeiture. They are representative of persistent forfeiture abuses that were incentivized by the large profits to law enforcement from the taking of private property.

Civil forfeiture is big business in Pennsylvania. A review of just two years of reports of the Pennsylvania Attorney General, law enforcement authorities in Pennsylvania derived income from forfeited property totaling \$17.9 million in fiscal year 2012-13 and \$13.3 million in fiscal year 2013-14.<sup>6</sup>

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<sup>6</sup> OFFICE OF PA. ATT'Y GEN., ASSET FORFEITURE REPORTS, FISCAL YEARS 2012-2014. FY2012-13 and FY2013-14.



On a local level, law enforcement agencies aggressively pursued civil forfeiture against Philadelphia residents. The table below summarizes the forfeitures obtained by the Philadelphia district attorney's office for the nine-year period of FY 2005-06 through FY 2013-14.

**PHILADELPHIA COUNTY FORFEITURE SUMMARY TABLE<sup>7</sup>**

<b>Fiscal Year</b>	<b>Cash Forfeited</b>	<b>Cars Forfeited</b>	<b>Houses Forfeited</b>	<b>Total Income From Forfeited Property</b>
FY 2005-06	\$ 4.3 MM	453	99	\$ 6.73 MM
FY 2006-07	\$ 3.1 MM	352	85	\$ 6.39 MM
FY 2007-08	\$ 3.8 MM	263	68	\$ 4.67 MM
FY 2008-09	\$ 4.5 MM	176	118	\$ 6.22 MM
FY 2009-10	\$ 4.3 MM	116	90	\$ 5.97 MM
FY 2010-11	\$ 4.2 MM	154	114	\$ 5.54 MM
FY 2011-12	\$ 3.8 MM	183	96	\$ 4.80 MM
FY 2012-13	\$ 3.5 MM	169	38	\$ 4.98 MM
FY 2013-14	\$ 2.7 MM	72	38	\$ 3.43 MM
<b>TOTALS</b>	<b>\$ 34.2 MM</b>	<b>1,938</b>	<b>746</b>	<b>\$ 47.73 MM</b>

Due to public exposure of such forfeiture abuses, along with individual representation by the Clinic and class action litigation successfully concluded by the Institute of Justice, Philadelphia changed many of its forfeiture practices. The *Philadelphia Inquirer* condemned forfeiture abuses in several editorials and civil forfeiture reform became a campaign issue in the local election of a district attorney. Today, civil forfeiture of homes has stopped in Philadelphia, but the focus of forfeiture has shifted to cash and cars. Annual state reports summarizing the large amounts of cash and other property forfeited in each of Pennsylvania's counties are published on the website of the Office of the Pennsylvania Attorney General. The most recent report available to the public is for the period of Fiscal Year 2019-20.<sup>8</sup>

### **Key Observations from Over Twenty Years of Civil Forfeiture Representation**

Based upon the Clinic's representation of scores of low-income individuals and families in Philadelphia over twenty years, I would like to offer several important observations about civil asset forfeiture on the local level that I believe apply with equal force to civil forfeiture actions on both the state and federal level.

<sup>7</sup> OFFICE OF PA. ATT'Y GEN., ASSET FORFEITURE REPORTS, FISCAL YEARS 2005-2014, available at [Annual Asset Forfeiture Reports – PA Office of Attorney General](#).

<sup>8</sup> The annual report for fiscal year 2019-20 is available at [Annual-Asset-Forfeiture-Report-FY-12-20-final.pdf \(attorneygeneral.gov\)](#).

## **Lack of Counsel**

Unlike criminal cases, civil forfeiture laws do not provide a right to counsel for the poor, leaving low-income families to defend against the loss of their property without any legal help. And, even when property owners can afford a lawyer, the government's seizure of modest amounts of cash and used vehicles often make it economically infeasible to hire a lawyer because legal fees exceed the value of seized property.<sup>9</sup>

Civil forfeiture laws are complex. Without legal help, unrepresented property owners are intimidated and overmatched by superior government resources. Unknowingly, property owners routinely waive constitutional and statutory defenses that should protect their property. Many individuals are unable to attend multiple court hearings about their property because they cannot jeopardize their employment or afford to lose wages from missed work. As a result, many individuals simply give up and walk away from their property even though they may have meritorious defenses. This is reflected in unacceptably high default rates that have plagued civil forfeiture over many decades. This means that the taking of private property often stands untested in the courts.

When property owners do present a defense, they learn that civil forfeiture laws are designed to make it as easy as possible for the government to prevail. Backed by influential lobbies, prosecutors have routinely secured the passage of forfeiture laws that place only the lowest evidentiary burden of proof upon government, deny indigent property owners a right to counsel, and shift the burden of proving innocence to property owners. Most civil forfeiture laws do not require that property owners be convicted of, or even charged with, a crime and they rarely set minimum thresholds for cash forfeitures. Unless constitutional defenses are expressly and timely asserted, trial courts sit passively as they permit the unknowing waiver of constitutional defenses under the excessive fines clause.

## **High Defaults**

One of the most disturbing aspects of civil forfeiture is its persistently high default forfeiture rates. In too many cases, the government is not required to prove the validity of its claims, and property owners never have their day in court. Studies

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<sup>9</sup> Studies have shown that the average forfeiture amount in Washington, D.C. is \$141 and the median forfeiture amount in Philadelphia is \$178. Mississippi seizures review of 315 cases found only six for property more than \$60,000. The small amounts show that police and prosecutors are pursuing the bulk of civil forfeiture cases for amounts that make it economically infeasible to hire counsel to fight to get their property back. See Radley Balko, *Study: Civil Asset Forfeiture Doesn't Discourage Drug Use or Help Police Solve Crimes*, WASH. POST (Jun. 11, 2019), <https://www.washingtonpost.com/opinions/2019/06/11/study-civil-asset-forfeiture-doesnt-discourage-drug-use-or-help-police-solve-crimes/>

demonstrate that property owners frequently lose their right to contest the government's claims and sometimes have little choice but to walk away from their hard-earned property. For example, a study of Pennsylvania forfeiture cases conducted by the American Civil Liberties Union ("ACLU") of Pennsylvania found that Philadelphia County has a default forfeiture rate approaching 87%. The same study also found that suburban Montgomery County, Pennsylvania, has a default forfeiture rate of 90%.<sup>10</sup>

Concerns over such high default rates are not new. Congress was deeply troubled by high default rates when it conducted legislative hearings leading up to CAFRA's enactment. In those hearings, Congress learned that approximately 80% of all federal forfeitures were uncontested.<sup>11</sup> In fact, the Congressional Budget Office reported that only 5% of seizures resulted in contested civil cases.<sup>12</sup>

There are understandable reasons for such high default rates that have nothing to do with the merits of the underlying claims. Civil forfeiture laws provide strong grants of strong authority to government prosecutors while providing only weak protections for property owners. Perhaps most significantly, property owners facing civil forfeiture do not have a constitutional right to counsel.<sup>13</sup> In a criminal case, an accused who cannot afford legal representation is entitled to have a lawyer provided for his or her defense. For more than fifty years since the Supreme Court's unanimous decision in *Gideon v. Wainwright*,<sup>14</sup> the effective assistance of counsel has been viewed as essential to achieving a fair trial. Although civil forfeitures are punitive and disfavored in the law, civil forfeiture laws do not provide for a right to counsel for indigent property owners facing the loss of their property.

Civil forfeiture is a quasi-criminal proceeding that falls between our civil and criminal justice systems and therefore neither public defenders nor legal aid lawyers generally handle these cases. Legal aid lawyers have their hands full with assisting indigent clients in mortgage foreclosures, child custody, domestic violence, tenant evictions, public benefits, elder abuse, and consumer fraud cases. As a result, low-income individuals are mostly on their own when confronting the government's seizure of their property in civil forfeiture cases, and they are ill-equipped to mount a defense without legal help against government prosecutors.<sup>15</sup>

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<sup>10</sup> "The fact that default rates in both counties are so high strongly suggests that no matter how 'fairly' civil forfeiture is administered, the current law is heavily tilted against the property rights of private citizens." ACLU OF PA., BROKEN JUSTICE 4 (2015), available at <http://goo.gl/FnbGOp>.

<sup>11</sup> See *Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary*, 106th Cong. 90 (1999) (statement of Roger Pilon, Vice President for Legal Affairs, Cato Institute). See also H.R. REP. NO. 105-358, pt. 1, at 28-29 (1997).

<sup>12</sup> 146 CONG. REC. H2040 (2000).

<sup>13</sup> See *United States v. 1603 Ocoala*, 803 F. Supp. 1194, 1197 (N.D. Tex. 1992) (no federal constitutional due process right to appointment of counsel in civil forfeiture proceedings); *Commonwealth v. \$9,847.00 U.S. Currency*, 704 A.2d 612, 613 (Pa. 1997).

<sup>14</sup> 372 U.S. 335 (1963).

<sup>15</sup> In CAFRA, Congress attempted to reduce high default rates in federal civil forfeiture proceedings by boosting access to counsel. "CAFRA grants discretionary authority to federal courts to appoint counsel where the property owner is accused of criminal activity related to the civil forfeiture [18 U.S.C. § 983(b)(1)(A)]; it provides for the

The economics of civil forfeiture also contributes to high default rates. Most civil forfeiture petitions in Pennsylvania seek to forfeit cash. Cash forfeitures are the most lucrative part of the forfeiture program. For example, in FY 2012-13, 76.4% of all income generated from forfeited property in Pennsylvania came from cash forfeitures.<sup>16</sup> If the amount of a cash seizure is small, as is true in many cash forfeitures, it is just not economically feasible for the property owner to lose time from work for multiple court appearances or to incur the expense of hiring a lawyer to defend the cash—regardless of the property owner’s innocence. In this common situation, the government wins by default because the transactional cost required to defend private property exceeds the value of the seized property.

A 2015 study of cash seizures in Philadelphia County revealed that half of all such cases involve sums as small as \$192 or even less.<sup>17</sup> And an investigative journalist’s 2012 study of cash forfeitures in Philadelphia County concluded that Philadelphia prosecutors regularly forfeit sums as small as \$100 and that it sometimes took as many as ten separate court dates to obtain a hearing before a judge for the return of this small amount of cash.<sup>18</sup> According to this study, the Philadelphia D.A.’s Office filed more than 8,000 cash forfeiture cases in 2010, seeking to forfeit, on average, just \$550 per filing. And in a sample of more than 100 cases from 2011 and 2012, the median amount of cash forfeitures was only \$178.

### **Civil Forfeiture’s Racial Disparity**

In the Clinic’s experience over two decades, clients caught up in civil forfeiture were overwhelmingly Black and, to a lesser degree, Latino. This conclusion is based upon a review of the clients who sought legal assistance from the Clinic as well as regular observations of property owners awaiting the call of their cases in Philadelphia’s full-time civil forfeiture courtroom. This same conclusion was also reported by an investigative journalist studying Philadelphia civil forfeiture practices.<sup>19</sup> Based upon these observations, the Penn Law Clinic decided to take a

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appointment of counsel as a matter of right at public expense for indigent property owners whose primary residences are the subject of the civil forfeiture proceeding [*id.* § 983(b)(2)(A)]; and it awards attorney’s fees to claimants who have substantially prevailed in civil forfeiture proceedings [*id.* § 983(b)(2)(B)].” See Louis S. Rulli, *The Long Term Impact of CAFRA*, 14 FED. SENTENCING REP. 87, 88 (2001). Congress funded the right to counsel for indigent property owners with monies from the Department of Justice’s Asset Forfeiture Fund and not from tax dollars. See *id.* at 89. This development has not been adopted by most states, including Pennsylvania. See NAT’L COAL. FOR A CIVIL RIGHT TO COUNSEL, *Status Map* (Civil Forfeiture), <http://www.civilrighttocounsel.org/map>.

<sup>16</sup> See Dick M. Carpenter II et al., *Instit. For Justice, Policing for Profit* at 122 (2d ed. Nov. 2015), available at <http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf>.

<sup>17</sup> *Dirty Money*, Editorial, *Phila. Inquirer*, July 6, 2015.

<sup>18</sup> Isaiah Thompson, *The Cash Machine*, *Phila. City Paper*, Nov. 28, 2012, <http://mycitypaper.com/The-Cash-Machine/>.

<sup>19</sup> *Id.* (“The majority of those affected [by civil forfeiture] . . . [are] generally black or Hispanic, working-class and poor.”).

closer look at available data to determine if actual court filings confirmed these observations.<sup>20</sup>

The Penn Law Clinic obtained data on every real estate forfeiture petition filed by the Philadelphia D.A.'s office during calendar year 2010. This data showed that the D.A.'s office filed 472 real estate civil forfeitures in that calendar year. Excluding several commercial properties, we charted the official assessed value and geographical location of each home against which a civil forfeiture petition was filed in that year. The results were troubling.

We learned that the mean assessed value of all residential properties in 2010 was only \$23,174.34. The median value was even lower at \$18,550.00, meaning that half of all homes against which civil forfeiture actions were filed had an official assessed value of under \$18,550.00. Perhaps, most revealing, we learned that 75% of all homes in civil forfeiture had an official assessed value of \$29,900 or less. These low assessed values confirm the Clinic's experience and observations that civil forfeiture actions are overwhelmingly brought against Philadelphia homes owned by families of very modest means who lack the financial resources to pay for legal representation.

The Penn Law Clinic also mapped out the physical location of each of the 472 residential real estate civil forfeitures filed in calendar year 2010 to determine which communities were most affected by civil forfeiture. We used *PolicyMap*,<sup>21</sup> a geographical mapping software program that integrates official census data and related demographic information into the mapping program. Using this software, we generated a map of the City of Philadelphia containing a pinpoint for every civil forfeiture action filed against a Philadelphia home in 2010. This map demonstrates that civil forfeiture petitions filed against homes are overwhelmingly concentrated in those areas of the City that have the highest concentrations of non-white residents.

Race-based disparity came into even sharper focus in a close-up mapping and analysis of the expanded Center City area of Philadelphia.<sup>22</sup> The expanded central area of the city has a high white population, in contrast to neighborhoods directly to the north and west of Center City. In this expanded central part of the city, the D.A.'s office filed only one civil forfeiture petition out of a total of 472 petitions filed against homes in 2010. Upon review of that one petition, we confirmed that this home belonged to a Black family.<sup>23</sup> Significantly, not a single forfeiture petition was brought against a white family's home in the heavily populated Greater Center City area of Philadelphia. This race-skewed result is difficult to explain because we know that drug activity occurs in this heavily populated area of the city and, in fact, police

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<sup>20</sup> Pennsylvania's civil forfeiture laws provide limited transparency to the public, mandating only that prosecutors provide annual reports with summary information about the types of forfeited property and forfeiture revenues. *See* 42 PA. CONS. STAT. § 6802(i) and (j). No race or gender or other demographics are reported.

<sup>21</sup> POLICYMAP, <https://www.policymap.com/> (last visited Oct. 28, 2016).

<sup>22</sup> For this purpose, the expanded central part of the City was defined as the area from the Delaware River to 44th Street and Powelton Avenue in the West and from Washington Avenue in the South to Fairmount Avenue in the North.

<sup>23</sup> 2305 Montrose Street is located in one of the few remaining predominately non-white areas of the central part of the city and was owned by a Black family.

records document an average of around 464 drug-related incidents annually in the Greater Center City Area. In short, while drug activity definitely occurs in this largely white residential area of the city, there was not a single civil forfeiture petition filed against the home of a white family in this part of the city in all of 2010.<sup>24</sup>

Notably, our review utilizing *PolicyMap* software also revealed that the vast majority of real estate forfeitures filed by Philadelphia prosecutors in 2010 were brought against families in the City's lowest income bracket—those making less than \$41,114 per year.<sup>25</sup> In short, the graphic mapping of 2010 civil forfeiture petitions reveals that Philadelphia prosecutors disproportionately filed civil forfeiture petitions against low-income families of color. These families largely lacked the financial resources needed to hire a lawyer and frequently had to proceed on their own if they wished to defend against civil forfeiture petitions seeking to permanently take their homes.

The ACLU of Pennsylvania has also conducted studies of the racial impact of civil forfeiture practices in Pennsylvania. For example, in Montgomery County, a suburban county located outside of Philadelphia, the ACLU found that only 9% of the population is black, yet black people made up 37% of those arrested for forfeitable offenses and 53% of property owners facing forfeiture.<sup>26</sup> In Cumberland County, located in south-central Pennsylvania, only 3% of the population is black, but black people make up 15% of those arrested for forfeitable offenses and 36% of property owners targeted for forfeiture.<sup>27</sup> According to the ACLU, it appears that in Cumberland County black people are eighteen times more likely to be the targets of civil forfeiture than people of other races.<sup>28</sup>

The Center for American Progress, a non-profit organization located in Washington, D.C., has also conducted research on civil forfeiture practices. In a published report, the Center noted that “while available data on the populations affected by civil asset forfeiture are limited, an array of analyses conducted by media outlets and advocacy organizations suggests that people of color are disproportionately impacted by civil asset forfeiture.” The report referred to civil asset forfeiture as “the new stop and frisk.”<sup>29</sup> It cited a 2014 analysis by the *Washington Post* that examined 400 court cases across 17 states which found that, “where people . . . challenged seizures and received some money back, the majority

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<sup>24</sup> According to reported studies, while marijuana is used at roughly comparable rates by white and black people, a black Pennsylvanian is 5.19 times more likely than a white Pennsylvanian to be arrested for marijuana possession. See, e.g., ACLU, WAR ON MARIJUANA IN BLACK AND WHITE 18 (2013), available at <http://www.aclu.org/feature/war-marijuana-black-and-white> (citing SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., NAT'L SURVEY ON DRUG ABUSE & HEALTH, 2001-2010).

<sup>25</sup> See Brief for ACLU of PA et al. as Amicus Curiae Supporting Appellee-Claimant at 37 (Fig. 3), *Commonwealth v. 1997 Chevrolet*, No. 30 EAP 2015 (Pa. Mar. 23, 2016), available at <http://goo.gl/THHnrV..>

<sup>26</sup> ACLU OF PA., BROKEN JUSTICE, *supra* note 10, at 6 & n.22.

<sup>27</sup> ACLU OF PA., FORFEITURE IN THE SHADOWS 5 & n.24 (2015), available at <http://goo.gl/bnm7ig>.

<sup>28</sup> *Id.* at 5-6 & n.25

<sup>29</sup> Rebecca Vallas et al., Ctr. for Am. Progress, Forfeiting the American Dream 5-6 (2016), available at <http://goo.gl/5XstPB>.

were black, Hispanic, or another minority.” While the *Post’s* analysis examined only cases where property owners successfully challenged forfeitures, people of color appear to bear the brunt of civil asset forfeiture whether they challenge it or not, in states and cities across the United States, according to the Center’s findings. For example, the report cited an Oklahoma study examining 401 cash seizures made between 2010 and 2015 in 10 Oklahoma counties that found that nearly two-thirds of seizures came from African Americans, Latinos, and other racial and ethnic minorities, even though 75 percent of the state’s population is white.

The Center also expressed concern that cash forfeitures keep low-income families from getting ahead and may drive them deeper into poverty. The Center’s report suggested that low-income and minority communities may be particularly hard hit by civil forfeiture because they are more likely to be disconnected from the financial mainstream, leaving their residents more likely to carry cash.<sup>30</sup> Low-income and minority residents are especially likely to operate outside the financial mainstream: As of 2013, nearly half of all black and Latino households were unbanked or underbanked compared with one in five white households. Because unbanked and underbanked individuals are often forced to carry relatively large sums of cash—such as a full month’s rent payment or wages from an entire pay period—they can be especially vulnerable to civil forfeitures of cash.

The Center’s report also expressed concern that low-income individuals may face special barriers to challenging governmental seizures. The cost of taking off from work to appear in court on multiple occasions can be too costly for individuals living paycheck to paycheck, and their absence from work may even threaten their continued employment. The Center reported that on average, a property owner facing civil forfeiture must spend four days in court to challenge the seizure of his or her property, and this can have a devastating impact upon low-wage workers.<sup>31</sup>

More recently, the Greenville News of South Carolina conducted a three-year investigation of civil forfeiture operations known as Rolling Thunder in South Carolina that was published in 2019.<sup>32</sup> This study found that the program was co-opted by local authorities as a steady revenue stream, resulting in significant racial disparities without a connection to fighting crime. The study noted that Black men comprised only 13% of South Carolina’s population, but 65% of the victims of civil

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<sup>30</sup> “In 2013, the most recent year for which data are available, 17 million Americans were unbanked—meaning they did not have a bank account—and 51 million Americans were underbanked—meaning they had a bank account but still utilized alternative financial providers, such as pawn shops or check cashers. Half of all households with income of less than \$15,000 were either unbanked or underbanked.”

<sup>31</sup> “For a minimum-wage worker, the cost of taking off work for four days is \$232—and that is if the worker’s employer will permit time off, a luxury many low-wage workers do not have. There is also the cost of hiring an attorney to help navigate the complex laws—an expense that most low-income individuals cannot afford—leaving many without legal representation given the scarcity of civil legal aid and other free or low-cost legal services.” *Id.* (endnotes omitted).

<sup>32</sup> See Nathaniel Cary, *Inside Look: How SC Cops Swarm I-85 and I-26, Looking for ‘Bad Guys’*, Greenville News, <https://www.greenvilleonline.com/in-depth/news/2019/02/03/operation-rolling-thunder-sc-civil-forfeiture-interstate-95-interstate-26/2458314002/>.

forfeiture. One-fifth of civil forfeiture victims were not charged with a crime or arrested; another one-fifth who were charged were not convicted. Fifty-five percent of the time police seized cash in amounts less than \$1,000, making it economically infeasible to hire legal help. For property owners too poor to afford counsel, there was no right to counsel and thus no available legal help. Ninety-five percent of forfeiture proceeds went to law enforcement with only five percent directed to the state's general fund. As a result, forfeiture profits amounted to approximately twelve percent of annual operating budgets of participating law enforcement agencies.

### **A Conviction in the Underlying Offense should be a Condition Precedent**

Four states have now abolished civil forfeiture.<sup>33</sup> If civil forfeiture is to remain, there should be a requirement that there be a conviction in the underlying criminal case before the civil forfeiture proceeding can go forward. More than fifteen states that retain civil forfeiture now require this.

Our experience in Philadelphia demonstrates that many property owners are never charged or convicted of a criminal offense, but nonetheless have their property seized and subject to forfeiture to the state. A Michigan study in 2016 quantified this problem. There, a study found that more than 700 innocent people had their assets forfeited. During that year, 523 individuals had their cash, cars, and other property taken without any criminal charges filed against them, while another 196 individuals were charged, but found innocent, of criminal activity.<sup>34</sup>

### **Elevate the Burden of Proof to Clear and Convincing and Shift the Burden of Proving Innocence from the Property Owner to the Government**

Until recently, government prosecutors in Pennsylvania only needed to meet their burden in a civil forfeiture case by a preponderance of the evidence. That standard was clearly too low to protect property owners from the erroneous deprivation of their property and we saw that problem frequently in court, especially as we watched unrepresented parties try to defend their property. More recently, some states, like Pennsylvania, Wisconsin, Montana, Nevada, and others, have elevated the burden to the higher standard of clear and convincing evidence. On the other hand, Massachusetts still retains the very low standard of probable cause. A preponderance of the evidence standard remains the dominant requirement in both state and federal civil forfeiture laws. However, a clear and convincing evidence standard should be the minimal burden of proof standard utilized in quasi-criminal proceedings such as civil forfeiture actions.

Additionally, like most states, Pennsylvania law provides for an “innocent owner” defense to civil forfeiture. However, this defense is an affirmative defense, meaning that it must be asserted formally at the pre-trial pleading stage or it is legally waived. Moreover, when

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<sup>33</sup> North Carolina, New Mexico, Nebraska, and Maine.

<sup>34</sup> See Jarrett Skorup, Civil asset Forfeiture Reform is Sweeping the Nation, THE HILL, (Mar. 7, 2020), <https://thehill.com/opinion/civil-rights/376961-civil-asset-forfeiture-reform-is-sweeping-the-nation>.



asserted, the burden is on the property owner to prove his or her innocence. Under such a law, the property owner must prove innocence by showing that he or she did not know of the illegal activity or did not consent to the illegal activity.<sup>35</sup>

Proving the negative is always a difficult burden, but it is especially difficult for property owners who are not represented by counsel and face superior government resources. Moreover, this proposition stands our legal system's time-honored presumption of innocence on its head. Our justice system is built firmly upon the legal proposition that all citizens are presumed innocent and the burden falls to the Government to prove otherwise. In civil forfeiture, however, this deeply rooted principle is reversed, even when property owners are not charged with a crime. The burden should be shifted back to the Government where it properly belongs.

### **A Lack of Transparency and Data Tracking**

Pennsylvania is typical of most states in requiring that the state attorney general and local district attorney's offices report annually on the number of homes, cars, and currency they forfeit and the total income generated from forfeiture proceeds. Yet, these are only summary reports; they do not provide the data necessary to answer whether civil forfeiture is being applied fairly to all citizens and communities. Such information is not mandated by civil forfeiture laws, and it is revealing that law enforcement agencies do not voluntarily compile or disclose this information.

In Philadelphia County, official civil forfeiture reports provided by the local district attorney's office reveal that over a period of nine fiscal years (2005-2014), the Philadelphia D.A.'s office received in its budget \$34.2 million in forfeited cash, 1,938 forfeited vehicles, and 746 forfeited homes, for a total of \$47.7 million in forfeited proceeds. Despite the magnitude of these numbers, the government's reports are silent about whose property was taken, what it was taken for, whether the owner was convicted of an offense, or whether property confiscation was applied fairly across racially and economically diverse communities. With such huge profits flowing to law enforcement agencies from confiscated property, it is hard to understand why legislators have not demanded to know such basic information about constituents who are most at risk in civil forfeiture.

There does not appear to be a single government study examining the race and income levels of homeowners who have lost their homes to civil forfeiture. Nor does there appear to be a government report analyzing whether the practice of seizing family homes from homeowners who are not charged with a crime makes communities safer or, conversely, whether it destabilizes fragile communities and undermines public safety.

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<sup>35</sup> 42 PA. CON STAT. ANN. §§ 6802(j) (West 2014). (The statute states that the burden of proof is on the owner to show "(1) That the claimant is the owner of the property or the holder of a chattel mortgage or contract of conditional sale thereon, (2) That the claimant lawfully acquired the property, (3) That it was not unlawfully used or possessed by him. In the event that it shall appear that the property was unlawfully used or possessed by a person other than the claimant, then the claimant shall show that the unlawful use or possession was without his knowledge or consent. Such absence of knowledge or consent must be reasonable under the circumstances presented.")

With such strong profit motives built into civil forfeiture laws, there is no satisfactory justification for not requiring answers to these fundamental questions from law enforcement authorities. The public should know whether aggressive civil forfeiture practices are applied fairly to all segments of the population or whether the most vulnerable members of our society disproportionately shoulder the burden of such harsh laws.

A report by the Institute for Justice found that 26 states have little to no transparency requirements for asset forfeiture. According to the IJ report, fourteen states "do not appear to require any form of property tracking, leaving in doubt even such basic questions as what was seized and how much it was worth, who seized it, when it was seized, where it was seized, and why it was seized." As investigative journalists quickly learn, formal information requests, and sometimes litigation, are needed to compel the release of even basic information.

### **Excessive Fines**

Few property owners facing civil forfeiture know they have a constitutional right to be free from excessive fines. A property owner who is unaware of this right is also unaware that it must be timely pleaded in the civil forfeiture action or else lost. Yet, an unaware property owner cannot count on the prosecutor or trial judge for enlightenment. Property owners facing civil forfeiture do not receive a *Miranda*-like notice of their constitutional right to be free of excessive fines (or any instruction on what they must do to assert it).<sup>36</sup> This then raises two important questions.

Should the government be required to notify property owners of their constitutional right to be free of excessive fines when it pursues civil forfeiture? Second, should a trial court be required to ensure that a property owner's waiver of this right is *knowing and intelligent*, as courts routinely do when they conduct on-record plea colloquies in criminal cases?<sup>37</sup>

In our experience on the local level, the excessive fines clause has been one of the most underutilized constitutional protections in defending against civil asset forfeiture. Unless affirmatively asserted and developed by the property owner, courts routinely fail to address gross disproportionality between the gravity of the offense and the property forfeited. This was especially true with home forfeitures where, when

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<sup>36</sup> The public may possess a general understanding of their *Miranda* rights, gleaned from popular TV shows such as *Law and Order*. Yet the public almost certainly lacks a comparable understanding of their constitutional right to be free from excessive fines—particularly in the civil forfeiture context. Thus, it is arguably even more important that persons facing civil forfeiture be notified of their constitutional right to be free of excessive fines.

<sup>37</sup> The Pennsylvania Supreme Court, for example, has "required of record, a full and complete colloquy . . . in the context of waiving the right to counsel, the right to a jury trial, and entering a guilty plea as opposed to proceeding to trial." *Commonwealth v. Vega*, 719 A.2d 227, 230 (Pa. 1998). The colloquy is a mechanism to ensure that such waivers are voluntary, knowing, and intelligent, as due process of law requires. *See, e.g., McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("A defendant who enters [a guilty] plea simultaneously waives several constitutional rights . . . [I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.")

raised, courts simply looked at the fair market value of the home and compared it with the amount of the statutorily authorized fine for the underlying offense, without regard to whether the offense was committed by a third party and not the property owner or whether the actual fine, as opposed to the authorized fine, was much lower. If the authorized fine exceeded the fair market value of the home, the court routinely found the taking not to be an excessive fine. We contended that this simplistic analysis was flawed for many reasons. At its core, it penalized low-income families whose homes was of lesser market value and permitted wealthier homeowners to protect their higher-valued property for the very same underlying conduct.

In the *Young* case, previously described, the Pennsylvania Supreme Court, at our urging in an amicus brief, announced a comprehensive test under the excessive fines clause that gives appropriate vitality to this essential protection. There, the Court stated that a court must first decide whether the property sought to be forfeited is an instrumentality of the underlying offense. If not, the inquiry ends and forfeiture is constitutionally impermissible. If a court finds that the property is an instrumentality of the offense, the court must then determine whether the value of the property sought to be forfeited is grossly disproportionate to the underlying offense. If grossly disproportionate, then forfeiture is impermissible. In determining the value of the property, a court must not only look at the fair market value, but also at the subjective value as well, taking into account whether the property is a family residence or is essential to an owner's livelihood, as well as considering the harm a forfeiture would bring to the owner or to innocent third parties.<sup>38</sup>

This standard does justice to the true meaning of *value* when determining gross disproportionality and should be required to be applied in every civil forfeiture case before a home can be permanently forfeited.

### **Low Cash Forfeitures**

The government's seizure of modest amounts of cash and vehicles often make it economically infeasible to hire a lawyer because legal fees often exceed the value of seized property.<sup>39</sup> Studies have shown that the average forfeiture amount in Washington, D.C. is \$141 and the median forfeiture amount in Philadelphia is \$178. Mississippi seizures review of 315 cases found only six for property more than

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<sup>38</sup> *Young*, 160 A.3d at 191.

<sup>39</sup> Studies have shown that the average forfeiture amount in Washington, D.C. is \$141 and the median forfeiture amount in Philadelphia is \$178. Mississippi seizures review of 315 cases found only six for property more than \$60,000. The small amounts show that police and prosecutors are pursuing the bulk of civil forfeiture cases for amounts that make it economically infeasible to hire counsel to fight to get their property back. See Radley Balko, *Study: Civil Asset Forfeiture Doesn't Discourage Drug Use or Help Police Solve Crimes*, WASH. POST (Jun. 11, 2019), <https://www.washingtonpost.com/opinions/2019/06/11/study-civil-asset-forfeiture-doesnt-discourage-drug-use-or-help-police-solve-crimes/>

\$60,000. The small amounts show that police and prosecutors are pursuing civil forfeiture cases for amounts that make it economically infeasible to hire counsel to fight to get their property back.

Our clients were able to obtain free legal services, but most clients go unrepresented and even if they can afford legal help, it would not make economic sense to spend more for legal help than the value of the seized currency.

### **Eliminate the Financial Incentive to Law Enforcement that Incentivizes Persistent Abuses**

A major criticism of civil forfeiture is that it creates a powerful profit incentive for law enforcement authorities that skews prosecutorial discretion and distorts agency priorities. Forfeited funds flow directly to law enforcement agencies from the property they seize, rather than to the general treasury. By so doing, these funds largely escape public accountability and transparency and they prompt abuses.

Pennsylvania, like most states, directs all forfeiture funds to law enforcement agencies. The sources of forfeited funds, the exact amounts, and their precise uses by law enforcement authorities are guarded information that is difficult, if not impossible, for the public to access. It is unlikely that Philadelphia would have engaged in such an aggressive grab of homes if a profit motive did not exist.

The major problem of directing forfeited funds to law enforcement agencies is that it creates a conflict of interest that incentivizes police and prosecutors to overreach and engage in abusive practices. This danger was certainly documented in Tenaha, Texas, where cash forfeitures during traffic stops along infamous highway corridors became commonplace and innocent citizens were coerced to sign waivers of their property to protect against threatened arrests, criminal prosecutions, or even loss of their children.<sup>40</sup> The solution is to direct all forfeited funds to the Treasury where there will be increased transparency and accountability.

### **Support for The FAIR Act of 2023 (HR 1525)**

The FAIR Act of 2023 appropriately targets these concerns and offers critical reforms that restore fairness in the legal process and provide needed safeguards against the wrongful taking of private property. It is instructive that since 2014 more than 35 states have enacted reforms to their civil asset forfeiture laws because of widespread abuse. Four states have eliminated civil forfeiture entirely.<sup>41</sup> A

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<sup>40</sup> See Sarah Stillman, *Taken*, THE NEW YORKER (Aug. 12, 2013), <http://www.newyorker.com/magazine/2013/08/12/taken>.

<sup>41</sup> North Carolina, New Mexico, Nebraska, and Maine.

growing number of states that retain civil forfeiture require a criminal conviction before forfeiture can take place. Others have raised the burden of proof for the government from preponderance of the evidence to clear and convincing and have shifted the burden of proving innocence from the property owner to the government. Still others have imposed minimum cash thresholds before forfeiture can take place, strengthened reporting and transparency requirements, banned equitable sharing with the federal government, and redirected forfeiture funds to the general fund or other public purposes. These and other reforms among the states are a powerful testament to the need for substantial reform of civil asset forfeiture. The federal government has failed to enact reforms for too long and, in some ways, has obstructed state reforms.

The FAIR Act of 2023 is deserving of strong support because it effectively addresses at least five key elements of needed reform.

(1) **Redirecting Forfeiture Funds.** First, it seeks to eliminate the financial incentive that law enforcement agencies possess under current law and that fuels abusive practices. By redirecting forfeiture funds to the U.S. Treasury, law enforcement agencies that decide whether to seize property and pursue forfeiture will no longer directly benefit from the outcomes of those decisions. In addition, seizing authorities may no longer retain property for their own use. These critical changes will boost accountability and transparency and, most importantly, remove the conflict of interest that undermines public confidence in the rule of law.

(2) **Providing Legal Representation.** The scales of justice are dramatically unbalanced in civil forfeiture actions. Low-income persons have only a very limited right to counsel under the Civil Asset Forfeiture Reform Act of 2000 (CAFRA).<sup>42</sup> The FAIR Act would substantially broaden this right to have legal help when a property owner cannot afford to hire counsel. This is critical because most seizures and forfeitures today involve cash and cars. In addition, the Act addresses the situation where the value of seized property is less than what it would cost to obtain legal help. Too often, property owners default because it costs more to hire a lawyer to defend the seized property than the property is worth. In these cases, the government unjustly prevails simply because of economics.

(3) **Eliminating Non-Judicial Forfeiture.** Non-judicial forfeiture, also known as administrative forfeiture, places the seizing agency in a decisional role regarding private property. Ordinary citizens understand the conflict of interest that this presents. The taking of constitutionally-protected, private property by the government should never be conducted without independent supervision and involvement of federal courts. The FAIR Act ends this practice and properly places

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<sup>42</sup> CAFRA provided a right to counsel for financially eligible homeowners whose primary residence was the subject of a civil forfeiture action.

civil forfeiture actions exclusively within the jurisdiction of federal district courts where they belong. In so doing, it also reduces governing time periods for providing notice to property owners and filing of forfeiture complaints that currently enable the process to be drawn out to the detriment of property owners who are without their cash or cars.

**(4) Elevating the Burden of Proof, Shifting the Burden to Prove Innocence, and Determining Proportionality.** For civil forfeiture proceedings to be fair, the burden of proof must be high enough to protect against the wrongful taking of private property, and it must be placed squarely upon the government. The FAIR Act addresses this in two ways. It elevates the burden of proof on the government to show the forfeiture is warranted from a preponderance of the evidence standard to the higher clear and convincing standard. The government will be required to prove a substantial connection between the property and offense and that the owner used the property with the intent to facilitate an offense or was willingly blind to the use of their property; this proof will need to be demonstrated by clear and convincing evidence. In addition, the Act shifts the burden of demonstrating a property owner's innocence from the property owner to the government. Upon the assertion of the innocent owner defense, the government will have the burden of proving that a property claimant is not an innocent owner and the claimant may rebut that evidence by showing that all was done that could reasonable be expected under the law.

In addition, the FAIR Act reinforces that property owners may petition to determine whether a government taking is constitutional under the excessive fines clause of the Eighth Amendment. It instructs courts to consider many factors before granting forfeiture, including the seriousness of the offense, the extent of the nexus, the range of sentences, the fair market value of the property, and hardship to the property owner and dependents. It removes the requirement that a forfeiture be "grossly" disproportionate to the seriousness of the offense (deleting the word "grossly"). It authorizes courts to reduce or eliminate forfeitures that are disproportionate to the offense.

**(5) Ending Equitable Sharing.** Equitable sharing has long been criticized for abusive practices that allow states to initiate seizures of property, usually cash from motorists on interstate highways, and then have federal authorities prosecute forfeiture under federal law, only to return up to 80% of forfeiture funds to the state agencies. In this way, state agencies circumvent the reforms adopted by their state legislatures and still realize the profit from forfeiture. While some states have banned their agencies from using equitable sharing, the practice is widespread and corruptive and remains the major way that state seizing authorities circumvent state law. The FAIR Act would seek to end such abusive practices and foster dismissal of federal actions in favor of state law.

There are additional provisions in the FAIR Act that are also very important, including the strengthening of reporting requirements, enhanced procedures for setting aside forfeitures, and changes in the handling of seizures of monetary instruments by the Internal Revenue Service.

## Conclusion

As former Attorney General Eric Holder stated in testimony before Congress, “no tool of law enforcement, however effective at fighting crime, can survive for long if the public thinks that it violates the basic principles of fairness and due process that lie at the core of the American system of justice.”<sup>43</sup>

The widespread use of civil forfeiture against innocent property owners has caused many to question whether civil forfeiture has strayed too far from its intended purpose and has become a grab for revenue rather than a tool to protect public safety. In *Leonard v. Texas*, Justice Thomas voiced this concern when he suggested that current forfeiture practices may not comport with the due process clause and the historical justification for civil forfeiture.<sup>44</sup> Noting that civil forfeiture had become “widespread and highly profitable” in recent decades, Justice Thomas stated,

This system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses....[T]hese forfeiture operations frequently target the poor and other groups least able to defend their interests in forfeiture proceedings. [citations omitted]. Perversely, these same groups are often the most burdened by forfeiture. They are more likely to use cash than alternative forms of payment, like credit cards, which may be less susceptible to forfeiture. And they are more likely to suffer in their daily lives while they litigate for the return of a critical item of property, such as a car or a home.

If civil asset forfeiture is to remain, it should return to its original purpose and needed reforms must be adopted to ensure that private property is adequately protected. The FAIR Act of 2023 is an important step in the right direction.

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<sup>43</sup> Oversight of Federal Asset Forfeiture: Its Role in Fighting Crime: Hearing Before the Subcomm. On Criminal Justice Oversight of the S. Comm. On the Judiciary, 106th Cong. 19 (1999) (statement of Eric Holder, Deputy Att’y Gen., U.S. Department of Justice).

<sup>44</sup> See Statement of Justice Thomas in *Leonard v. Texas*, 137 S. Ct. 847, 849 (2017), *cert. denied* (“Whether forfeiture is characterized as civil or criminal carries important implications for a variety of procedural protections, including the right to a jury trial and the proper standard of proof.”).

Thank you for this opportunity to provide written testimony in support of the FAIR Act of 2023.